(19)

No. 95-1340

IN THE

Supreme Court of the United States

October Term, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief *Amicus Curiae* of Taxpayers Against Fraud, The False Claims Act Legal Center in Support of Respondent.

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INTEREST OF *AMICUS CURIAE*

Taxpayers Against Fraud, The False Claims Act Legal Center (TAF) is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through use of the *qui tam* provisions of the federal False Claims Act (FCA or Act). TAF's mission is both activist and educational. Established in 1986, TAF serves to: 1) collect and evaluate evidence of fraud against the Federal Government and facilitate the filing of meritorious False Claims Act *qui tam* suits; 2) work in partnership with *qui tam* plaintiffs, private attorneys, and the Government to prosecute *qui tam* suits effectively; and 3) inform and educate the public about the Act and its *qui tam* provisions.

As part of its educational outreach, TAF collects and disseminates information concerning the False Claims Act and *qui tam*. For example, TAF publishes the *False Claims Act and Qui Tam Quarterly Review* (TAF QR) which provides an overview of case decisions, recoveries, and other developments. TAF also maintains a comprehensive FCA library and an educational presence on the Global Internet.

Over the last decade, TAF has supported numerous FCA cases that have collectively returned hundreds of millions of dollars to the United States Treasury. The funds TAF recovers from successful cases are continually reinvested to develop and support future *qui tam* actions and to fund TAF's educational activities. TAF possesses extensive knowledge about the origin and purposes of the False Claims Act Amendments of 1986 and experience with the amended FCA's implementation.[1]

SUMMARY OF ARGUMENT

Congress passed the 1986 FCA Amendments in response to pervasive fraud against the Federal Government and several identified weaknesses of the Government's anti-fraud efforts.

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[1] Counsel for all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

These weaknesses included the lack of detection of fraud, insufficiency of government enforcement efforts, and inadequacy of government resources. Congress envisioned that *qui tam* relators could substantially contribute to anti-fraud efforts by exposing and bringing forward evidence of fraud, activating and advancing cases to prosecution, and providing financial and human resources. Accordingly, Congress' primary aim in amending the Act was to bolster anti-fraud efforts by encouraging more private enforcement suits.

The amended FCA allows any person to bring suit, limited only by four specific restrictions, including the restriction relevant here -- 31 U.S.C. § 3730(e)(4) (1994). For § 3730(e)(4) to be triggered, its precise wording requires that every element be satisfied, including that there has been a "public disclosure." The plain and ordinary meaning of "public" and "disclosure," in the context of the statute as a whole and its purposes, requires that for a "public disclosure" to occur there must be an affirmative act of exposure to the people as a whole.

The proper determination of whether a "public disclosure" has occurred involves an objective analysis of both the means of disclosure and the audience that has received the disclosure. The first part of the inquiry examines whether the means by which a disclosure was made rendered it likely that it would reach the people as a whole. In the converse, to the extent there were restrictions on access, the disclosure could not possibly be considered "public." The second part of the inquiry examines whether the actual audience to which the disclosure was made constitutes the general public; or, conversely, whether the audience received the information only in some special capacity. In the case at bar, the audits were never disseminated in a manner designed to reach the people as a whole. Moreover, the contractors only received the audits because of their business relationship with the Government. Thus, the Ninth Circuit correctly held that no "public disclosure" occurred in this case.

Petitioner's interpretation of "public disclosure" is at odds with the plain language of the statute and essentially renders "public disclosure" superfluous. Moreover, Petitioner's

interpretation rests upon an unsupported and erroneous view of the Act and its history. The actual language of the statute and the actual language in the legislative history reveals Congress' intent to invite all citizens to join in the effort to expose and remedy fraud. Congress' only limits on its broad appeal are set forth in specific and concrete terms in the statute.

Petitioner's propositions regarding damages under the FCA are also baseless. Proof of damage to the public fisc is not an element of an FCA violation. This is apparent from the text of the statute, the legislative history, and this Court's prior decisions. Moreover, submission of claims for payment while knowingly violating an explicit cost accounting disclosure requirement can form the basis for FCA liability.

ARGUMENT

I. Background

A. Congress Designed the 1986 FCA Amendments in Response to Rampant, Unremedied Fraud Being Committed Against the Government.

The 1986 FCA Amendments were the legislative response to what Congress concluded was a "severe" problem -- that is, the "growing pervasiveness of fraud" in Federal programs and procurement. S. REP. NO. 345, 99th Cong., 1st Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 (S. REP.).[2] Congress revitalized the False Claims Act's *qui tam* provisions because it believed that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." S. REP. at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267. Its explicit intent was "to encourage

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[2] Congress cited with alarm U.S. Department of Justice (DOJ or Justice Department) estimates that fraud was draining up to 10 percent of the entire Federal budget. S. REP. at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268; *accord* H.R. REP. No. 660, 99th Cong., 2d Sess. 18 (1986) (H. REP.) ("Evidence of fraud in Government programs and procurement is on a steady rise.").

more private enforcement suits" under the Act. S. REP. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89.

Congress' redesign of the FCA's *qui tam* provisions was aimed at addressing three general categories of weaknesses in the Government's ability to prosecute fraud effectively. First, Congress recognized that "most fraud goes undetected" due in part to the Government's "weak internal controls and the fact that government auditors do not pay adequate attention to possible fraud." H. REP. at 18; *accord* S. REP. at 2-3, *reprinted in* 1986 U.S.C.C.A.N. at 5287-88. Congress also emphasized that, among those who are aware of fraud, "there appears to be a great unwillingness to expose illegalities." S. REP. at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

Second, Congress determined that, even when evidence of fraud is detected, the Government takes action to recover taxpayer dollars lost to fraud "in only a small percentage of cases." S. Rep. at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267. It expressed concern that "there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action." H. REP. at 22-23. Citing Justice Department data, the Senate Report concluded that "most fraud referrals remain unprosecuted and lost public funds, therefore, remain uncollected."[3] S. REP. at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

Congress considered the third weakness it identified -- lack of adequate resources -- as "perhaps the most serious problem plaguing effective enforcement." S. REP. at 7, *reprinted in* 1986 U.S.C.C.A.N. at 5272. It recognized that the Government, working alone, simply has insufficient resources to detect and prosecute the level of fraud being committed -- especially given the growth and diversification of federally funded programs that are targets of fraud. *Id.* As a

[3] According to the Senate Report, Justice Department statistics showed that in fiscal year 1985 the Civil Division received 2,734 fraud referrals, but filed only 36 complaints and obtained merely 54 settlements or judgments. S. REP. at 4 n.10, *reprinted in* 1986 U.S.C.C.A.N. at 5269 n.10.

result, law enforcement officials are "forced to make 'screening' decisions based on resource factors." *Id.* Further, Congress determined that, "Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Id.*

Congress also concluded that, "An additional problem . . . exists when large, profitable corporations are the subject of a fraud investigation and able to devote many times the manpower and resources available to the Government." S. REP. at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273. The Senate Report stated that, "[I]n far too many instances the Government's enforcement team is overmatched by the legal teams major contractors retain." *Id.* Given budgetary constraints, Congress foresaw that the amount of government resources devoted to policing fraud would not substantially increase. S. REP. at 7, *reprinted in* 1986 U.S.C.C.A.N. at 5272.

Congress viewed the increased involvement of private citizens through *qui tam* suits as vital to addressing each of the problems it identified. As such, it described its "overall intent" in amending the *qui tam* provisions as "to encourage more private enforcement suits." S. REP. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89.

Congress envisioned that, using the revitalized *qui tam* provisions, private citizens could contribute to the anti-fraud effort in a variety of ways including: 1) bringing forward and exposing evidence of fraud,[4] 2) activating and advancing

[4] S. REP. at 25, *reprinted in* 1986 U.S.C.C.A.N. at 5290 ("[I]n many cases, individuals knowing of fraud are unwilling to make disclosures in light of potential personal and financial risk as well as a lack of confidence in the Government's ability to remedy the problem."); H. REP. at 23 ("The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.").

cases to prosecution,[5] and 3) providing financial and human resources.[6] Congress believed that giving *qui tam* relators a more direct role in the litigation would also serve as "a check" to ensure that "the Government does not neglect evidence, cause . . . [undue] delay, or drop the false claims case without legitimate reason." S. REP. at 26, *reprinted in* 1986 U.S.C.C.A.N. at 5291.

B. The 1986 Amendments Carefully Balance Government Prosecutorial Prerogatives and Incentives for *Qui Tam* Relators.

The 1986 FCA Amendments revised the *qui tam* provisions in several respects. Most notably, Congress created a structure for *qui tam* relators to actively participate in the litigation, added ranges of financial awards for successful relators, and removed restrictions on *qui tam* actions where the Government already possessed evidence or information regarding the alleged fraud.

Under the amended *qui tam* provisions, a relator initiates an FCA suit by filing a complaint under seal. The relator also provides the Government a copy of the complaint and a written disclosure of substantially all material evidence and information in his possession. 31 U.S.C. § 3730(b)(2) (1994). The Government then has sixty days to investigate the allegations and decide whether to intervene and assume

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[5] H. REP. at 22-23 ("[T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."); S. REP. at 24, *reprinted in* 1986 U.S.C.C.A.N. at 5289 ("[M]uch of the purpose of *qui tam* actions would be defeated unless the private individual is able to advance the case to litigation.").

[6] S. REP. at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273 (injecting private resources into the fraud enforcement effort can even out the current mismatch of human and financial resources between the Government and corporate targets); S. REP. at 26, *reprinted in* 1986 U.S.C.C.A.N. at 5291 ("[T]he often heavy, sporadic workload of Government attorneys may create a situation where a *qui tam* plaintiff is better able to conduct the litigation in a timely manner.").

primary responsibility for prosecuting the action. *Id.* However, the Government can (and usually does) move to extend the time period for keeping the action under seal and making its intervention decision. 31 U.S.C. § 3730(b)(3) (1994).[7]

Congress designed the Act to permit the relator to participate in the litigation while reserving substantial control for the Government. For instance, in those cases where the Government initially declines to intervene, the Government may intervene in the suit at a later date upon a showing of good cause. 31 U.S.C. § 3730(c)(3) (1994). When the Government does intervene, the relator continues as a party to the action, but the Government has the "primary responsibility for prosecuting the action" and is not bound by any act of the relator. 31 U.S.C. § 3730(c)(1) (1994). The Government and the defendant may ask the court to restrict the relator's participation in the action for various reasons. 31 U.S.C. § 3730(c)(2)(C) - (D) (1994); *see also* 31 U.S.C. § 3730(c)(4) (1994) (Government may petition the court to stay a relator's discovery). And the Government may settle the action over the objections of the relator, provided the relator is given an opportunity for a hearing, and provided that the settlement is "fair, adequate, and reasonable." 31 U.S.C. § 3730(c)(2)(B) (1994).

As these provisions indicate, Congress constructed the Act to allow the Government to choose among a variety of different options, using its limited resources where it deems most efficient. For instance, the Government can preserve its resources by choosing to intervene in the *qui tam* actions most likely to lead to substantial recoveries, leaving smaller dollar cases, or those with substantial litigation risk, for *qui tam* relators to develop and pursue on their own. Moreover, to protect its interests, "The Government may dismiss the action

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[7] Where there is a related criminal investigation or proceeding, the *qui tam* action is normally kept under seal or stayed pending conclusion of the criminal action. Petitioner's suggestion to the contrary is misleading; moreover, it is irrelevant to the statutory construction issues before this Court and instead part of Petitioner's policy argument against the concept of *qui tam* itself that is woven throughout Petitioner's brief.

notwithstanding the objections of the [relator] . . . ." 31 U.S.C. § 3730(c)(2)(A) (1994) (§ 3730(c)(2)(A)).

Congress also recognized that relators' contributions will vary greatly and, as a result, established multiple ranges of monetary awards for differing levels of contribution. For example, relators who obtain recoveries without the Government's intervention are eligible for the highest range of recovery -- 25 to 30 percent of the proceeds. *See* 31 U.S.C. § 3730(d)(2) (1994). Other relators are eligible to receive 15 to 25 percent, "depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1) (1994). However, relators whose actions are based primarily on certain "disclosures," including non-public disclosures (*infra*, section II.B.), may receive only up to 10 percent, and could receive no award. *Id.* The percentage award for this latter class of relators is dependent in part on whether the relator contributed by "advancing the case to litigation." *Id.*

Also of significance is what Congress did not include in its 1986 amendments. Congress did not create any affirmative test for relators to satisfy in order to gain standing to file an action. Instead, the Act simply states that, "A person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b) (1994) (§ 3730(b)). The wide authorization of private suits granted by § 3730(b) reflects Congress' stated goal of encouraging "*any* individual knowing of Government fraud to bring that information forward." S. REP. at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267 (emphasis added).

The invitation for anyone to act as a relator is limited only by the four specific restrictions listed at 31 U.S.C. § 3730(e) (1994). The restriction relevant to the instant case, § 3730(e)(4)(A), reads as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation,

> or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

As discussed in section II, *infra*, with this language Congress used concrete and specific terms to describe certain conditions under which an action would be foreclosed.

C. The Effect of the *Qui Tam* Amendments.

In October of 1996, the amended *qui tam* provisions of the FCA marked ten years of existence. Congress believed that allowing and encouraging assistance from private citizens "can make a significant impact on bolstering the Government's fraud enforcement effort." S. REP. at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273. Indeed, since the amendments were enacted, at least $1.455 billion has been recovered due to relators' initiatives under the Act's *qui tam* provisions.[8]

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[8] As of July 23, 1996, DOJ reported *qui tam* recoveries of approximately $1.13 billion. Letter from Frank W. Hunger, Assistant Attorney General, Civil Division, Justice Department, to the Honorable Charles E. Grassley 2 (July 23, 1996) (Appendix at A1) (Hunger letter). Since then, settlements from just four *qui tam* cases have produced an additional $325 million in recoveries. Press Releases of the Justice Department entitled "Major Clinical Laboratory To Pay $187 Million To Resolve Charges Of Making False Claims To Government Programs -- Third Largest Health Care Fraud Recovery" (Nov. 21, 1996), "Damon Clinical Laboratory Agrees To Pay $119 Million To Resolve Charges Of Making False Claims To Government Programs" (Oct. 9, 1996), "FMC Corp. Agrees To Pay $13 Million To Settle False Claims Act Allegations" (Oct. 8, 1996), and "Two National Clinical Laboratories: Corning And Unilab Pay $11 Million To Federal Government To Settle False Medicare And Other Federally-Funded Insurance Programs Claims" (Sept. 19, 1996) (These materials have been lodged with the Clerk of the Court.). Without any government assistance, *qui tam* relators in 39 cases have recovered approximately $26 million. Hunger letter at 2. While many of the cases declined by DOJ are dismissed -- often voluntarily by the relator without any litigation -- a conservative calculation, based on the statistics currently available, of the average recovery from *all qui tam* actions is approximately $2 million per case ($1.455 billion total recoveries from 481 declined plus 39 resolved cases plus 208 cases in

Other data further show that the amended Act is living up to Congress' goal of enhancing the Government's ability to recover losses sustained by fraud. While originally used primarily against false claims submitted by defense contractors, the Act has recovered hundreds of millions of dollars illegally diverted from health care for the elderly, the poor, and government employees, from social services programs for children, from government-sponsored scientific research grants, from transportation safety initiatives, from housing and urban development programs, and from other crucial federal expenditures. TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER, THE 1986 FALSE CLAIMS ACT AMENDMENTS TENTH ANNIVERSARY REPORT 18-24, 34 (1996).[9]

Besides being applied to a variety of Government programs, the Act has been used to prosecute a broad variety of illegal activity. The Act has recovered funds fraudulently obtained from the Government by double billing, product substitution, unnecessary services or services not performed, cost shifting, false testing, noncompliance with statutes, regulations, or contract terms, inadequate quality of care, kickbacks, and the like.

The Act's successes have been acknowledged and acclaimed by public servants from different government branches and different political parties. The Vice President wrote on the occasion of the amended Act's tenth anniversary:

> [T]he "*qui tam*" provisions of this law have recovered $1.3 billion of the American people's money. By revitalizing the original 1863 "False Claims Act", Americans now possess the tools needed to help us stop fraud and abuse of many government programs. Certainly, this represents the kind of public-spirited

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which DOJ joined). The actual average is probably higher in that, of the 208 cases DOJ has joined, many are still pending and will likely produce additional substantial recoveries.

[9] This material has been lodged with the Clerk of the Court.

> participation in government that needs to be encouraged and applauded.

Letter from Vice President Al Gore to Taxpayers Against Fraud, The False Claims Act Legal Center (Sept. 27, 1996), *reprinted in* 7 TAF QR 24 (Oct. 1996).[10] The Attorney General at the time the amendments were passed, Edwin Meese III, also celebrated the law's ten years of existence:

> It is a pleasure for me to join you in marking the tenth anniversary of the enactment of the False Claims Act Amendments of 1986, which was signed into law by President Ronald Reagan. . . . Because of this statute, private citizens have provided information and filed lawsuits on behalf of the federal government to recover taxpayer funds from those engaged in fraud and abuse of the people's money. This law has strengthened the incentives and protections for those individuals who have served their country in this manner, and has thus been an excellent example of privatization in the public interest.

Letter from Edwin Meese III to Taxpayers Against Fraud, The False Claims Act Legal Center (Aug. 15, 1996), *reprinted in id.* at 25.

The Justice Department also commended the value of the amended *qui tam* provisions. The Assistant Attorney General of the Civil Division, Frank Hunger, noted that the *qui tam* provisions are "[o]bviously . . . working very well" and further stated:

> The recovery of over $1 billion demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against fraudulent use of public funds. . . . This is a remarkable achievement for the taxpayers of this country.

Press Release of the Justice Department entitled "Justice Department Recovers Over $1 Billion In Qui Tam Awards And Settlements" 2 (Oct. 18, 1995).

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[10] This material has been lodged with the Clerk of the Court.

This praise for *qui tam* is justified not only by available statistics regarding recoveries and breadth of application, but also by the findings of an economic study recently completed.[11] According to the analysis contained in that study, *qui tam* recoveries under the FCA can be expected to equal between about $6.9 billion and $9.3 billion over the next ten years. Further, deterrence of fraud due to the Act's *qui tam* provisions can be expected to range between $105.1 billion and $210.1 billion over the period 1996 to 2006.

II. The Meaning of "Public Disclosure" Under § 3730(e)(4)(A) Is Determined by Its Plain Language Read in Context with the Statute As a Whole and Its Purposes.[12]

This case raises the issue of how "public disclosure" under § 3730(e)(4)(A) should be interpreted. As this Court has ruled, the starting point for interpreting a statute is the words of the statute itself. *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). "Public disclosure" is not defined in the FCA. However, "[w]hen terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 115 S. Ct. 788, 793 (1995).

A. The Ordinary Meaning of "Public Disclosure" Is An Affirmative Act of Exposure to the People As a Whole.

Section 3730(e)(4)(A) bars actions "based upon the public disclosure of allegations . . . ." Thus, "public" is used as an adjective to modify or describe a type of "disclosure."

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[11] William L. Stringer, THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT (Sept. 1996) (An Economic Study Commissioned By Taxpayers Against Fraud, The False Claims Act Legal Center). This material has been lodged with the Clerk of the Court.

[12] TAF adopts Respondent's position on retroactivity and offers this analysis in the event that the Court finds that § 3730(e)(4), as amended, applies to this case.

"Public," in its adjectival form, is defined as "of, relating to, or affecting the people as an organized community,"[13] and "relating to, or affecting the whole body of people or an entire community."[14] It is further defined as "[o]pen to all,"[15] "exposed to general view,"[16] and "[g]enerally known (public knowledge)."[17]

"Disclose" means "to open up," "to expose to view," "to make known,"[18] and "[t]o bring into view by uncovering; to expose; to make known."[19] "Disclosure" is, of course, the "[a]ct of disclosing."[20]

"Public" is commonly used as a modifier to describe

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[13] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1836 (3d ed. 1976) (WEBSTER'S).

[14] BLACK'S LAW DICTIONARY 1227 (6th ed. 1990) (BLACK'S). Several other dictionaries similarly define "public" as relating to the community as a whole; for instance, "[o]f or pertaining to the people as a whole; that belongs to, affects, or concerns the community or nation; common, national, popular," THE OXFORD ENGLISH DICTIONARY 778 (2d ed. 1989); "of, relating to, or affecting all the people or the whole area of a nation or state," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 944 (10th ed. 1995); "[o]f, concerning, or affecting the community or the people," THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1464 (3d ed. 1992).

[15] BLACK'S at 1227.

[16] WEBSTER'S at 1836.

[17] WEST'S LEGAL THESAURUS/DICTIONARY 618 (1985). Other synonyms for "public" include, "Notorious, well-known, manifest, patent, acknowledged, visible, exposed, plain, overt, evident, published, publicized." *Id.*

[18] WEBSTER'S at 645.

[19] BLACK'S at 417.

[20] *Id.*

places and objects that are open and available for use by all (e.g., public library, public park, public telephone). However, when used to modify an act such as a disclosure, e.g., "public announcement," "public statement," or "public airing," the term takes on a more precise meaning. That is, a "public" announcement, statement, airing, or disclosure is one that is directed to the people as a whole, i.e., the general public. When any of those terms is used without "public" as a modifier, it could refer to an announcement, statement, airing, or disclosure that may or may not be directed to the general public. That is, one could make an announcement, statement, or disclosure in a private setting or to a select group of people. However, such acts would not be considered "public."[21] Clearly, a "public" announcement, statement, airing, or disclosure connotes exposure to the people as a whole.

In short, the ordinary meaning of "public" and "disclosure," when read together, requires an affirmative act which exposes a matter to the people as a whole.

B. Petitioner's Flawed Interpretation Renders the Statute's "Public Disclosure" Language Superfluous.

As this Court has recognized, we must assume that "Congress intended each of its terms to have meaning." *Bailey*, 116 S.Ct. at 506. Indeed, "'[j]udges should hesitate . . . to treat [as surplusage] statutory terms in any setting.'" *Id.* at 506-07 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)). Moreover, "[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Id.* at 507.

The wording of § 3730(e)(4)(A) is precise. Broken out by its basic elements, the Act forecloses those actions that are:

1) "based upon"

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[21] For example, a political candidate could make a "public statement" or "public announcement" at a press conference. However, if that candidate made the same statement or announcement to only his campaign staff, then it would not be considered "public."

2) "the public disclosure"

3) "of allegations or transactions"

4) a) "in a criminal, civil, or administrative hearing,"
b) "in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or"
c) "from the news media,"
(collectively "enumerated means")

5) so long as neither the Attorney General nor an "original source" brought the action.

This statutory structure reveals that each of the various elements, including "public disclosure," has meaning and requires a separate and distinct inquiry. To understand the meaning of "public disclosure" it is useful to eliminate interpretations that are inconsistent with both the plain language and the structure of the statute. For example, the statute clearly does not read "based upon allegations or transactions . . ." or "based upon the disclosure of allegations or transactions . . ." or "based upon allegations or transactions . . . that are disclosed to a stranger to the fraud." Yet, the interpretations urged by Petitioner and supporting *amici* presume just that. In other words, to adopt their interpretations would require that "public disclosure," or at a minimum, the term "public," be read out of the statute altogether. Additionally, their interpretations require that the phrase "stranger to the fraud" or some equivalent be added to the statute.

While Petitioner concedes that an ordinary meaning for "public disclosure" is disclosure to the general public, Brief for Petitioner at 25 (Pet. Br.), Petitioner instead urges a definition that could not possibly fit within the phrase's plain meaning or the context of the statute. Petitioner defines "public disclosure" to mean a disclosure to any one person, so long as that person is a "stranger to the fraud." As the first step of its analysis, Petitioner appears to rely on the fact that the enumerated means listed at § 3730(e)(4)(A) (e.g., audits

and investigations) are not automatically disclosed to the general public. *Amicus* Lockheed Martin similarly emphasizes that the Government generally "does not publish its audit reports, mail them to reporters or other industry observers, place them in the Congressional Record, or file them in libraries or courthouses." Brief of Lockheed Martin Corp. as *Amicus Curiae* in Support of the Petitioner at 20 (Lockheed Martin Br.). From this observation, Petitioner leaps to a conclusion that "public disclosure" therefore must be limited to the narrowest manner in which the enumerated means could possibly be disseminated.

Petitioner misreads the statute so that the enumerated means swallow the phrase "public disclosure" and render it superfluous. That is, if the ordinary or narrowest level of dissemination for the enumerated means determines, defines, and limits the meaning of "public disclosure," there is no need for the "public" modifier -- nor indeed for the entire "public disclosure" phrase in the statute. Under Petitioner's definition, the statute would read "based upon the disclosure of allegations or transactions in (or from) [the enumerated means]" or even simpler "based upon allegations or transactions in (or from) [the enumerated means]."

Ironically, Petitioner's observations regarding the private and often narrowly disseminated nature of the enumerated means instead supports and explains why "public disclosure" is a necessary and meaningful modifier in the statute. That is, "public disclosure" is necessary to distinguish between those common instances in which allegations or transactions in audits, investigations, etc. *are not* exposed or disseminated to the general public and those instances when they *are*.[22]

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[22] Similarly, "public disclosure" is necessary to distinguish those "allegations or transactions" "from the news media" which are exposed to the general public versus those that are not. For example, a reporter conducting an investigation may unearth "allegations or transactions" of FCA misconduct and reveal those to sources he is interviewing. However, until those "allegations or transactions" are "publicly disclosed" (e.g., through publication or broadcast of a news story), the "public disclosure" element of § 3730(e)(4)(A) is not established.

Moreover, we need look no further than § 3730(d)(1) to see that the Act itself distinguishes between a "*public* disclosure" through the enumerated means and a mere "disclosure" through the enumerated means. That provision provides, in part:

> Where the action is one which the court finds to be based primarily on *disclosures* . . . relating to allegations or transactions in a criminal, civil, or administrative hearing . . . or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds . . . .

§ 3730(d)(1) (emphasis added).

Unlike § 3730(e)(4)(A), this section does not include the word "public," but it does list the exact same enumerated means through which a "public" disclosure may occur. Therefore, it is clearly recognized in the statutory language itself that allegations or transactions in or from the enumerated means can be disclosed either publicly or non-publicly. In short, "public" adds independent and substantive meaning in § 3730(e)(4)(A).

Petitioner's argument that "public disclosure" means disclosure to "some member of the public" also renders the statutory phrase meaningless. Because everyone is conceivably a "member of the public," a "public disclosure" would occur whenever "allegations or transactions" in one of the enumerated means were read, viewed, or heard by anyone. Adopting this definition would mean a "public disclosure" occurs when, for example, the person who prepares an administrative audit report shows it to his superior or provides it to the subject of the audit for review. Similarly, a "public disclosure" would occur when an investigator discusses a fraud investigation with his spouse or ten-year-old child.

Moreover, Petitioner fails to adhere to a consistent "member of the public" theory. Instead, it arbitrarily carves out certain members of the public -- "non-strangers to the fraud" -- to whom receipt of a disclosure would not trigger the bar. That is, according to Petitioner, "public" in

§ 3730(e)(4)(A) refers to "a member of the public who is a stranger to the fraud." Pet. Br. at 13. In addition to never defining "strangers to the fraud," Petitioner fails to explain how its "stranger to the fraud" concept is implicit or explicit in any definition of "public," or why a "non-stranger to the fraud" is not a member of the public.

It appears that the actual intent behind the tortured definitions posited by Petitioner and its *amici* is to persuade this Court to read out the term "public" to help turn § 3730(e)(4)(A) into "a quick trigger" that will require virtually all relators to prove they qualify under the "original source" exception. In other words, they aim to make the exception the rule. However, Congress did not include a disclaimer -- either in the statutory language or legislative history -- that subsection (A) is not to be taken seriously.[23]

C. The Purposes of the 1986 Amendments Support Defining "Public Disclosure" As Exposure to the People As a Whole.

The public disclosure bar at § 3730(e)(4) is embedded in a broader piece of legislation that substantially rewrote the *qui tam* provisions of the False Claims Act. As discussed above, the 1986 FCA Amendments were the congressional response to the "growing pervasiveness of fraud." S. REP. at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5266. To address this problem, Congress was explicit that its intent was "to encourage more private enforcement suits." S. REP. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89. The legislative history is full of Congress' concerns about fraud draining the Treasury and its desire to appeal to the private sector to pitch

[23] Petitioner has apparently abandoned the argument in its Petition for *Certiorari* that documents are somehow "publicly disclosed" when potentially available under FOIA. Petition for *Certiorari* at 16-18, Supplemental Brief at 6. In any event, the Ninth Circuit's holding that the mere existence of documents potentially available to the public does not constitute a public "disclosure" under § 3730(e)(4)(A) is wholly correct. To hold otherwise would both ignore the plain meaning of the term "disclosure" and fly in the face of Congress' explicit elimination of the government possession of information bar.

in and help remedy the problem. In contrast, there is virtually no discussion in the legislative history pertaining to restrictions for certain types of suits or certain types of relators. Such restrictions were clearly not Congress' primary concern; i.e., Congress was searching for ways to encourage *qui tam* actions, not bar them.

Congress designed the revised *qui tam* provisions not only to summon private individuals to bring forward eyewitness evidence of fraud, but also to enlist the private sector in exposing fraud (however they may come upon it), advancing cases to prosecution, and providing financial and human resources to the litigation. S. REP. at 4, 7-8, 25-26, *reprinted in* 1986 U.S.C.C.A.N. at 5269, 5272-73, 5290-91. Congress recognized that some relators could potentially contribute to all of these purposes, while others would contribute less. To account for the varied levels of possible contributions by relators, Congress created ranges of financial awards. § 3730(d)(1)-(2).

For example, the statute clearly allows cases based primarily on non-public "disclosures" in audits, investigations, and other enumerated means. While in these cases the relators may not be contributing evidence of fraud that originated from their own first-hand knowledge, such relators may be able to contribute to the purposes of the statute by exposing the alleged fraud to the public, by activating a case, and by offering resources to prosecute the case. The size of the relator's award, however, will depend on what is actually contributed. And where a relator provides no contribution, the statute provides that the court may deny the relator an award altogether. § 3730(d)(1).

With § 3730(e)(4), Congress drew a line barring cases derived from certain "public" disclosures. These cases present a somewhat different scenario from cases that utilize information from *non*-public disclosures. That is, if the alleged fraud has already been exposed to the general public, a relator with no independent information is unlikely to be able to significantly advance the purpose of exposing and bringing forward evidence of fraud. Moreover, once evidence of fraud is disclosed to a widespread general audience (e.g., via a

televised investigative report or an open congressional hearing), it is more likely that pressure will be brought to bear on the Government to activate a case and less likely that the matter will slip through the cracks of the Government's law enforcement structure. On the other hand, when disclosures are confined to a select or restricted audience, chances increase that the matter may not receive adequate attention and wrongful conduct will remain unremedied.

D. Petitioner's Interpretation of "Public Disclosure" Rests Upon an Unsupported and Erroneous View of the FCA and Its History, and Is at Odds with the Purposes of the Statute.

Since Petitioner and its *amici* cannot rely on (and notably rarely cite to) the plain language of the statute to support their interpretation of "public disclosure," they instead devote much of their briefs to spinning out an unsupported and erroneous view of the False Claims Act and its history. Petitioner's interpretation of the Act ultimately hinges on its repeated assertion that the 1986 Congress aimed to preserve an alleged "traditional" "bedrock" distinction between "whistleblowers" and "parasites." It fails, however, to define what it means by "parasitic" versus "whistleblower" actions -- other than that the former should be prohibited and the latter should not. Further, neither Petitioner nor its *amici* can point to anywhere in the current or former versions of the Act where those terms are used, or even to any reference to "parasitic actions" in the committee reports accompanying the 1986 amendments.[24]

A complete and objective reading of the 1986 legislative materials belies Petitioner's rendition of history. In 1986, Congress pointed out that, under the original 1863 FCA, there were no restrictions on *qui tam* actions and an action could be instituted "as easily by a private individual, as by the Government's Representative." S. REP. at 10, *reprinted in*

[24] The only support (beyond its own repeated assertions) that Petitioner provides for its alleged "bedrock" "parasitic" theory is lower court case law dicta which do not cite to or rest on any language in the statute or legislative history.

1986 U.S.C.C.A.N. at 5275. The 1986 Congress further recognized this Court's upholding of the Act's lack of restrictions in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). S. REP. at 10-11, *reprinted in* 1986 U.S.C.C.A.N. at 5275-76. Far from expressing outrage at the *Marcus* case, the Senate Report highlighted the portion of Justice Black's decision in which he pointed out that, even if the relator had merely copied the Government's indictment, he "contributed much to accomplishing one of the purposes for which the Act was passed" by tripling the net recovery for the Treasury. S. REP. at 11, *reprinted in* 1986 U.S.C.C.A.N. at 5276.

While the 1986 Congress traced the 1943 legislative action that followed *Marcus*, it also noted that there was considerable debate at the time regarding the advisability of establishing restrictions against citizen suits. *Id.* It then criticized the breadth of the 1943 amendments, using egregious examples to illustrate the counterproductive effect of the 1943 government possession of information bar.[25] S. REP. at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 5277-78. Most significantly, the 1986 Congress did not express any

[25] While the 1986 Senate Report cited *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244 (D. Hi. 1980) (applying 1943 jurisdictional bar even if the Government makes no effort to investigate) and *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (using 1943 bar to dismiss state relator that had conducted investigation and given information to the Federal Government), nowhere does it indicate that Congress was seeking only to remedy the situations presented in these cases. S. REP. at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 5277-78. In fact, if Congress wanted to do only that, it could have achieved that result by tailoring an amendment to the government possession of information bar. For example, Congress could have simply added "investigation" to government possession and included an exception for relators who had originally supplied the fraud information to the Government. Instead, Congress crafted completely different language. The only conclusions the Senate and House Reports permit upon an objective reading are that Congress understood the 1943 bar, realized its deleterious ramifications for *qui tam* litigation, and wanted to create an entirely different system that would encourage and support *qui tam* actions.

particular concern regarding so-called "parasitic" actions.

In fact, to the extent Petitioner uses "parasitic" to refer to cases derived from secondary sources, Congress clearly decided not to exclude those actions wholesale, carving out at § 3730(e)(4) only limited and specific types of such cases that would be barred. As discussed *supra* at I.B., II.C., the plain language of the Act explicitly permits actions based on certain secondary sources. § 3730(d)(1). Congress' explicit response to such cases (which, as explained above, may have value, albeit perhaps diminished) was to cap the relator's award at 10 percent and introduce the possibility of no award at all if the relator ends up providing no value. Thus, contrary to Petitioner's assertions, adopting its tortured reading of § 3730(e)(4) is not necessary to prevent a so-called non-contributing "parasite" from receiving an undeserved "windfall" "by diverting money from the public fisc." Pet. Br. at 23, 37. The plain language of the statute (which Petitioner ignores) already provides more than adequate protection for the public fisc.[26]

Petitioner's and its *amici's* primary concern appears to be the non-meritorious *qui tam* action, which they attempt to incorporate under their "parasitic" label. But § 3730(e)(4) has nothing to do with judging whether a case presents evidence

[26] Similar award reductions would have been one way for the 1943 Congress to have dealt with its concerns regarding *Marcus*. Under the law that existed at the time of *Marcus*, the relator was guaranteed a 50% recovery regardless of where he obtained his information. However, the award structure established by Congress in 1986 -- under which the Government receives the bulk of the recovery from every *qui tam* suit -- made it prudent not to establish an overly broad bar of certain types of *qui tam* suits or relators. Under the amended Act, a relator who ends up contributing little or no value may receive little or no award under § 3730(d)(1). Even in those cases where the relator is in the 15-25% award category, the Government still retains 75-85% of the recovery. On the other hand, the Government may very well end up recovering nothing whenever a relator capable of bringing a successful case is barred. In short, the cost to the Treasury of an expansive bar on relators would be much greater than that of leaving the door open for relators who may provide minimal contribution.

of conduct that violates the Act. Rather, it sets forth a set of conditions under which a *qui tam* action -- regardless of its merits -- may not be brought. Congress has chosen to rely on the Federal Rules of Civil Procedure, supplemented by §§ 3730(d)(4) and 3730(c)(2)(A) of the Act, to deter and eliminate actions that are clearly without merit.[27] Petitioner nevertheless promotes its flawed and overly expansive interpretation of § 3730(e)(4) as a means to do so -- an interpretation which would also deter and eliminate even the most meritorious *qui tam* suits.

E. The Ninth Circuit Correctly Held that No "Public Disclosure" Occurred in this Case.

A proper determination of whether a "public disclosure" under § 3730(e)(4)(A) has occurred involves an objective analysis of both the means of disclosure and the audience receiving the disclosure. The first part of the inquiry examines whether the means by which a particular disclosure was made rendered it likely that it would reach the people as a whole. This would include looking at whether the means of disclosure contemplated dissemination to the general public and whether the disclosure was made equally available to all. In the converse, to the extent there were restrictions on access, the disclosure could not possibly be considered "public."

The second part of the inquiry examines whether the actual audience to whom the disclosure is made constitutes the general public; or, conversely, whether the audience received the information only in some special capacity. This inquiry would include looking at whether a disclosure was made to a select group that was given access to the information because of its status (e.g., disclosure made to a contractor's employees in the scope of their employment; disclosure made to a contractor because of its business relationship with the Government; disclosure made to a litigant solely because of its

[27] Under § 3730(d)(4), if a *qui tam* suit is clearly frivolous or brought primarily for harassment purposes, the defendant may be awarded its attorneys' fees and expenses. Under § 3730(c)(2)(A), the Government may dismiss a non-meritorious case notwithstanding the objections of the relator.

status as a party).

The Ninth Circuit was correct in holding that, where contractor employees were provided access to a government audit, no "public disclosure" occurred. Clearly, the means of disclosure in that instance (i.e., the Government simply supplied an audit to Petitioner and Northrop pursuant to its contractual relationship with the companies) neither contemplated nor resulted in disclosure to the people as a whole. On the contrary, the Government simply made private disclosures to certain of its contractors -- not to the public. Moreover, because there were restrictions on access to the audits, these disclosures certainly cannot be considered "public."[28]

Similarly, the actual audience to whom the audit was disclosed was not the general public, but a select and limited group. Here, the contractor employees received the audit in their capacity as employees and solely because of their employer's business relationship with the Government.

F. If this Court Agrees with Petitioner and Finds There Was a "Public Disclosure," the Court Needs to Clarify to the Ninth Circuit That "Based Upon" Means "Derived From."

If this Court reverses the Ninth Circuit and agrees with Petitioner that the mere divulgence of a government audit to company employees is a "public disclosure" within the

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[28] DCAA Audit Report No. 4511-7B486004 (Oct. 16, 1986) (Jt. App. at 33-38) and DCAA Audit Report No. 4511-7B486004SI (June 2, 1987) (Jt. App. at 39-42) are marked "FOR OFFICIAL USE ONLY" on the bottom of each page. Further, the first pages of each report warn that, "Contractor information contained in this audit report may be confidential. The restrictions of 18 U.S.C. § 1905 should be considered before this information is released to the public." *See also* Supplemental Affidavit of John F. Wilson in Support of Defendant's Motion for Summary Judgment F.R.C.P. 56(b) (Jt. App. at 113-15) and Declaration of Laurie L. Bilbruck (Jt. App. at 116-17) (affirming that the Air Force Audit at issue in this case was classified "SECRET" during the relevant period).

meaning of § 3730(e)(4)(A), then whether Respondent's suit was actually "based upon" the public disclosure, and, if so, whether he qualifies as an "original source" will need to be addressed by the Ninth Circuit. Ninth Circuit case law, however, appears to essentially read "based upon" out of § 3730(e)(4)(A); moreover, it adds an illegitimate extra-textual requirement to the explicit definition of "original source" at § 3730(e)(4)(B).

As the Fourth Circuit persuasively found in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 115 S. Ct. 316 (1994), "based upon" in § 3730(e)(4)(A) is "susceptible to a straightforward textual exegesis." *Siller*, 21 F.3d at 1348. The Fourth Circuit explained, "To 'base upon' means to 'use as a basis for.' Rather plainly, therefore, a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *Id.* (citation omitted).[29]

To the extent that Congress intended to bar a certain group of so-called "parasitic" actions, it addressed the "parasitic" concept through the "based upon" language of § 3730(e)(4)(A). Thus, should the Court adopt Petitioner's view of "public disclosure," the Court should make clear that only those actions that are actually "derived from" public disclosures are barred. It is particularly important to clarify the meaning of "based upon" in this case given that the Ninth Circuit, without squarely facing the issue, has strongly suggested that the § 3730(e)(4)(A) bar automatically applies once a public disclosure has occurred, regardless of how the relator obtained his information. *See United States ex rel.*

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[29] *United States ex rel. LeBlanc v. Raytheon Co.*, 62 F.3d 1411 (1st Cir. 1995) (affirming the district court's opinion adopting *Siller* definition of "based upon" as "derived from"). Certain other circuits have either ignored the "based upon" requirement or found that it merely means "supported by" regardless of whether the relator actually derived his knowledge from the public disclosure. *See United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992); *Cooper v. Blue Cross and Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994).

Devlin v. State of Cal., 84 F.3d 358, 360 (9th Cir.), *cert. denied*, 117 S. Ct. 361 (1996); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992).

Additionally, the Ninth Circuit has grossly erred in its interpretation of the "original source" exception to the § 3730(e)(4)(A) bar, dramatically and arbitrarily narrowing who can qualify as an "original source." Ignoring the clearly expressed statutory definition of "original source" at § 3730(e)(4)(B), the Ninth Circuit imposes an extra-textual requirement that a relator "'must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based.'" *Wang*, 975 F.2d at 1418 (*quoting United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990)). This requirement simply does not exist anywhere in the language of § 3730(e)(4)(B).[30] Moreover, contrary to the clear intent of Congress, this interpretation of "original source," along with Petitioner's erroneous view of "public disclosure" and a definition of "based upon" that differs from "derived from," would constrict *qui tam* actions significantly beyond the pre-1986 government knowledge bar.[31]

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[30] The Fourth and Eleventh Circuits have thoroughly criticized and rejected the Ninth Circuit's extra-textual requirement. *Siller*, 21 F.3d at 1351-55; *Cooper*, 19 F.3d at 568 n. 13. This Court should likewise follow its own precedent and reject the imposition of an additional requirement that appears nowhere in the statute. *See Smith v. United States*, 113 S. Ct. 2050, 2054 (1993).

[31] For example, under these theories, where "allegations or transactions" of fraud are revealed in the morass of civil discovery in litigation between two private parties, any subsequent *qui tam* action to remedy that fraud, even if brought by the most knowledgeable insider who did not see the discovery, would be barred. While ignored by Petitioner, it should be noted that courts have not limited the enumerated means to only those disclosures made by the Government or the media. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 n.5 (3d Cir. 1991) ("We also reject summarily the law firm's contention that subsection (e)(4)(A) addresses only those public disclosures made by the government."); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993) (holding that information produced in discovery in civil suit between two private litigants was publicly disclosed.).

The courts below have not made any factual determinations whether Respondent's action was actually "based upon" any of the alleged public disclosures or, if so, whether Respondent is an "original source." Thus, a remand with instructions setting forth the proper meaning of "based upon" and "original source" is warranted should this Court reverse the Ninth Circuit's "public disclosure" holding.

III. Petitioner's Propositions Regarding Damage Requirements Under the FCA Are Baseless.[32]

Petitioner's *cert.* petition asks, "Whether injury to the public fisc is an essential element of a cause of action under the FCA." Petitioner's brief changes the question to, "Whether the FCA imposes liability for alleged infractions of other statutes or regulations regardless of whether such infractions result in a 'false claim' against the public fisc." These are two different questions. Each will be considered separately.

A. Proof of Damage to the Public Fisc Is Not an Element of an FCA Violation.

The text of the statute, the legislative history, and this Court's prior opinions make clear that proof of damage to the public fisc is not a prerequisite to FCA liability.

The language of the statute is perfectly clear -- a cause of action under the Act does *not* include the requirement that the public fisc be damaged. Section 3729(a) lists seven ways the

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[32] TAF briefs this issue in the event that the Court's ruling on retroactivity requires its consideration.

Act may be violated[33]. The seven violations are phrased so that even an *unsuccessful* attempt to commit one of them gives rise to liability. If an unsuccessful attempt gives rise to liability, damage to the public fisc is clearly not a prerequisite to an FCA violation.[34] Further, the structure of the statute also reflects this fact. Only after the seven violations are enumerated and the statute provides that they cause liability does the Act address damages.

Congress considered this a significant enough issue to address in its legislative history. It made it clear that damage to the public fisc is not a prerequisite to FCA liability: "The United States is entitled to recover . . . forfeitures solely upon proof that false claims were made, without proof of any damages. . . . A forfeiture may be recovered from one who submits a false claim though no payments were made on the claim." S. REP. at 8, *reprinted in* 1986 U.S.C.C.A.N. 5273 (citation omitted).[35] The Senate Report further made clear

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[33] For example, 31 U.S.C. § 3729(a)(1) and (2) (1994) state: "Any person who -- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; . . . is liable to the Untied States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . ."

[34] This crafting of the statute is consistent with Congress' overall purpose of clamping down on widespread fraud against the Government.

[35] Elsewhere the Report stated that, "The cost of fraud cannot always be measured in dollars and cents, however. . . . Even in the cases where there is no dollar loss -- for example where a defense contractor certifies an untested part for quality yet there are no apparent defects -- the integrity of quality requirements in procurement programs is seriously undermined. A more dangerous scenario exists where in the above example the part *is* defective and causes not only a serious threat to human life, but also to national security." S. REP. at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268 (emphasis in original).

that, "The Supreme Court's opinion in *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), indicated that the False Claims Act, 'was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.' The Committee strongly endorses this interpretation of the act . . . ." S. REP. at 19, *reprinted in* 1986 U.S.C.C.A.N. at 5284.

A line of this Court's cases over fifty years old is consistent with the statute's text and history. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Government discovered fraud on several projects before making any payments. When this Court reviewed that case, it affirmed the district court's holding that failure to show actual damage at trial does not preclude recovery under the Act. The Court cited this conclusion with approval in *Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 n.5 (1956).

The Court's decision in *Neifert-White*, about ten years later, reiterated that the Government need not prove damages to establish FCA liability. It stated that, "[T]he False Claims Act should not be given the narrow reading that respondent urges. This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." 390 U.S. at 233, cited with approval in S. REP. at 19, *reprinted in* 1986 U.S.C.C.A.N. at 5284. The Court's choice of the word "attempts" shows that unsuccessful efforts to get the Government to pay a false or fraudulent claim also violate the Act.

Thus, there is neither statutory, legislative, nor Supreme Court support for Petitioner's suggestion that a violation of the FCA requires proof of damage to the public fisc.

B. When a Regulation Is a Requirement of a Federal Contract or Program, Knowing Failure to Comply with It Incurs FCA Liability.

Petitioner's restatement of its question presented for *certiorari* seems simply to present a truism -- a violation of the

False Claims Act requires a false claim. This Court does not need to spend any time on such a non-issue. Lurking behind Petitioner's restated question, however, may be another issue -- can a violation of a statute or regulation trigger FCA liability? The law's legislative history addressed this question straight on. In responding affirmatively to the question, it stated, "The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation." S. REP. at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5274; *accord* H. REP. at 21 ("[A] false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of a contract term, a statute, or a regulation.").

Petitioner would have this Court rule that a violation of the FCA, whether or not triggered by statutory or regulatory noncompliance, requires that the Government be overcharged. Such a ruling, however, would not comport with the statute's text or legislative history. Indeed, the legislative history pointed out clearly that the conduct prohibited by the Act is much broader and more sophisticated than just overcharges. It stated that, "[C]laims may be false even though . . . services are provided as claimed if, for example, the claimant is ineligible to participate in the program . . . ." S. REP. at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5274.

In this case, Respondent has alleged that Petitioner violated the FCA by failing to disclose adequately its method of allocating costs between two contracts. Petitioner's compliance with this statutory disclosure requirement was an explicit contractual requirement. As such, "knowing" non-compliance with this requirement, even if in the end the Government was not overcharged, triggered FCA liability.

CONCLUSION

For these reasons, the opinion of the Ninth Circuit should be affirmed.

Respectfully submitted,

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January 3, 1997

January 3, 1997

APPENDIX

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 23, 1996

The Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Grassley:

Thank you for your letter of June 21, 1996, concerning the ten-year anniversary of the qui tam amendments to the False Claims Act. The amendments can be credited with over a billion dollars in recoveries to the Treasury to date.

To respond to your specific questions, as a preliminary matter, you should be aware that many qui tam cases are handled by the United States Attorneys' offices throughout the country. Although we attempt to maintain current information, we have found in the past that it is necessary for us to contact each U.S. Attorney's office to ensure the accuracy of our data. The last time we performed such an update was the end of last year. We are in the process of

performing a new update, and when more current statistics are available, we will forward them to you.

Since the 1986 amendments to the qui tam statute, there have been 1386 qui tam case filed, as follows:

FY 87 - 33 cases
FY 88 - 60 cases
FY 89 - 95 cases
FY 90 - 82 cases
FY 91 - 90 cases
FY 92 - 119 cases
FY 93 - 131 cases
FY 94 - 221 cases
FY 95 - 278 cases
FY 96 - 277 cases (to date)

Our records show that, to date, the Department of Justice has chosen to pursue 208 of these cases. In the cases pursued by the United States, we have, from the 1986 amendment to date, obtained recoveries of about $1.13 billion.[1] Of this amount, the Department of Defense is the client agency as to 68% of the dollars, the Department of Health and Human Services is the client agency as to 26% of the dollars, and other agencies are the clients as to 6% of the dollars.

We have paid the qui tam plaintiffs who brought the lawsuits to us $196,515,473.60 as their statutory share in the cases we have pursued. This amount represents about 18% of the government's damages in cases where relator shares have

[1] In the same time period, the Department recovered an approximate additional $2.3 billion in non-qui tam fraud matters within the authority of the Commercial Litigation Branch. Our office does not track the number of complaints filed throughout the country in False Claims Act cases that are not qui tam cases. Some of the non-qui tam fraud recoveries were obtained after a complaint was filed, and some were obtained through pre-suit settlements.

been determined.[2] These shares have almost always been determined through mutual agreement between the United States and the qui tam plaintiffs.

Our records show that we have declined 723 qui tam cases. Qui tam plaintiffs have obtained recoveries in 39 of these cases. Of the remaining cases, 481 have been dismissed with no recovery, 29 are inactive, the status is unclear in 72 cases, and the qui tam plaintiffs are actively litigating 102 cases.

Total False Claims Act recoveries in cases that the Department has declined to pursue to date are about $26 million. In these cases, the qui tam plaintiffs have been paid a total of $7,026,217.50 as their statutory share, representing about 28.5% of the government's damages in cases where shares have been determined. In cases that the Department of Justice has declined to pursue, the qui tam plaintiffs or their attorneys have also recovered additional amounts for other causes of action, for costs, or for attorneys' fees, in which the United States Treasury has not shared. We know of an additional $24,426,798.55 in such payments in cases we have declined, but in many instances these amounts have not been reported to us, and so the amount actually recovered is larger by an unknown amount.

Our records show that 455 qui tam cases are still under investigation. We assume that our current survey will provide additional information with respect to some of the cases which we show in this category.

Of the qui tam cases still pending, about 38% involve the Department of Defense as the client agency, and about 40% involve the Department of Health and Human Services as the client agency.

The occasion of the anniversary gives me the opportunity to again congratulate you and Congressman Berman on the success your amendments have proven for the taxpayer.

[2] This includes cases where the share, under the statute, is to be between 0 and 10%, 31 U.S.C. § 3730 (d) (1).

Please do not hesitate to contact me if you need any additional information.

Respectfully yours,

/S/

Frank W. Hunger
Assistant Attorney General

cc: The Honorable Howard L. Berman
Committee on the Judiciary
U.S. House of Representatives